16-3877, 17-8

U.S. Court of Appeals for the Second Circuit

JAMES G. PAULSEN, Regional Director of Region 29
of the National Labor Relations Board for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellee-Cross-Appellant

v.

PRIMEFLIGHT AVIATION SERVICES, INC.,

Defendant-Appellant-Cross-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

RESPONSE AND REPLY BRIEF OF
DEFENDANT-APPELLANT-CROSS-APPELLEE

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INTRODUCTION

We respectfully submit this reply in support of PrimeFlight's direct appeal and response to the Regional Director's cross-appeal. For all the reasons set forth in our opening brief and below, this Court should vacate the preliminary injunction and reject the Regional Director's cross-appeal.

I. The DC Circuit has now rejected the Board's reliance on the NMB's new, narrowed standards for asserting RLA jurisdiction over derivative carriers because they represent an arbitrary and capricious change from past practice.

As set forth in our opening brief, the district court erred "by deferring to several recent NMB decisions that represent a change in NMB policy without reasoned explanation." Opening Br. at 32. We detailed how the NMB (and derivatively the Board) recently began departing from thirty years of precedent under which the NMB acknowledged "jurisdiction under the RLA over contractors in airline carrier cases to now declining such jurisdiction despite the existence of 'similar grounds,'" a change in the agency's position that "represents an important policy change with significant practical implications." *Id.* at 33-34. Under Supreme Court cases such as *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016), this unexplained change and

inconsistency in the NMB's position is a reason for holding the agency's action arbitrary and capricious, unlawful, and not entitled to *Chevron* deference. *Id.* at 32. On March 7, 2017, the Court of Appeals for the District of Columbia Circuit issued its decision in *ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F.3d 1137 (D.C. Cir. 2017), adopting the very argument we made in our opening brief.

A. This Court should follow *ABM Onsite*.

In *ABM Onsite*, the D.C. Circuit ruled on an employer's petition for review of an NLRB order. The employer, ABM Onsite Services—West ("ABM"), is an independent contractor hired by a consortium of airlines at Portland International Airport to operate the airport's baggage-handling system. 849 F.3d at 1140-41. In January 2015, the International Association of Machinists filed a petition with the NLRB seeking to represent certain of ABM's employees involved in its baggage-handling operations. *Id.* at 1141. ABM objected to the NLRB's jurisdiction on the ground the company is subject to the RLA, not the NLRA. The company argued in the alternative the NLRB should refer the jurisdictional question to the NMB for an advisory opinion. *Id.* The Board rejected ABM's arguments, asserted jurisdiction, and found the

company engaged in an unfair labor practice by refusing to recognize the union. *Id.* at 1142.

On ABM's petition for review and the NLRB's cross-petition for enforcement, the D.C. Circuit directly addressed the same jurisdictional question presented here. The court began:

> This case turns on the fundamental principle that an agency may not act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a). The NLRB has violated that cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so.

Id.

The D.C. Circuit noted that – just as set out in our brief (Opening Br. at 33-36) – the NMB developed its prior standards for asserting RLA jurisdiction beginning in 1980 and applied them consistently for thirty years. *Id.* at 1142-43. The *ABM* court found that under the prior standards, "ABM would plainly fall under the control of air carriers." *Id.* at 1143. The court explained:

> The NLRB does not even attempt to argue otherwise. Indeed, the NMB previously found control and jurisdiction with facts similar to these for many airline-services contractors. In fact, according to one commentator, the NMB "found RLA jurisdiction in all but one of over thirty [such] airline-control cases" it considered between the mid-1990s and 2011. Brent Garren, NLRA and RLA Jurisdiction over

> Airline Independent Contractors: Back on Course, 31 ABA J. Lab. & Emp. L. 77, 93 (2015).

Id.

The D.C. Circuit also pointed to the NMB's decision in *Air Serv Corp.*, 33 NMB 272 (2006) as "an especially clear example of how that agency used to find carrier control over contractors like ABM." *Id.* at 1143. The court continued:

> Indeed, there is no meaningful distinction between the control United exercised over Air Serv and the control carriers exercise over ABM. ***Here, the carriers' flight schedules determine the work schedules of the Company's employees.*** The Consortium decides when, where, and how many employees work at a time. It provides much of the equipment the Company uses, along with office space. The Consortium specifies the exact procedures by which ABM employees do their jobs, and it has access to ABM employee-training and qualifications records. The Consortium's general manager directly trains ABM employees on bag hygiene, and when the general manager does not do the training himself, the Consortium still provides the training materials and dictates the procedures to be followed. And even though ABM supervises its own employees, the Consortium wields a great deal of influence in practice through its comprehensive monitoring of the contract's performance.

Id. at 1143-44 (emphasis added).

The D.C. Circuit found that "[h]ad the NLRB followed the NMB's analysis in *Air Serv*, there is no question that ABM would be covered by

the RLA and that the NLRB would have no jurisdiction over this labor dispute." *Id.* at 1144.

The D.C. Circuit further noted that "in prior cases where carrier influence over personnel decisions was a factor weighing in favor of a finding of control," the NMB never held "the ability to discipline or discharge company personnel was necessary or even that it was a factor to be given significantly greater weight than the others." *Id.* Under the NMB's prior long-standing precedent, the NMB found sufficient airline control for RLA jurisdiction "even where there was no indication that an airline 'ha[d] the right to request employee discipline or removal' and where 'there [was] no evidence that [the airline] ha[d] [ ]ever requested [the contractor] to discipline or remove an employee.'" *Id.* (citation omitted).

In contrast to these prior case, the D.C. Circuit observed that "the NMB in 2013 began requiring that air carriers exercise a substantial 'degree of control over the firing [] and discipline of a company's employees' before it would find that company subject to the RLA." *Id.* at 1144. Just as we argued in our brief (Opening Br. at 35-36), the D.C. Circuit found this change in the NMB's standards to be "a clear

departure from precedent" for which it failed to provide any rationale. *Id.* The court reasoned:

> The NMB made no effort to explain this change to its test for RLA jurisdiction. The agency expanded on this approach later [in 2013] in *Bags, Inc.*, where it found especially relevant that the employer made the final disciplinary decisions, even though airlines could provide "input" into the process. *See* 40 NMB 165, 170 (2013). The NMB determined that meaningful control was lacking even though, in this line of cases, carriers provided training and operating-procedure manuals, *Menzies Aviation, Inc.*, 42 NMB 1, 2 (2014); determined staffing levels, *id.* at 4; *Aero Port Servs.*, 40 NMB at 141; controlled scheduling, *Bags, Inc.*, 40 NMB at 170; provided equipment and space, *id.*; *Menzies Aviation*, 42 NMB at 2; recommended promotions, *Airway Cleaners, LLC*, 41 NMB 262, 266 (2014); and possessed veto authority over material changes to contractors' staff, *id.* at 265.

Id. at 1144-45.

The D.C. Circuit concluded the NLRB could not escape its obligation to engage in reasoned decision making by blindly following the NMB's unexplained changes from its prior cases. "Given the NLRB's previous endorsement of the [NMB's] prior approach, it was not enough for the NLRB simply to follow suit without an explanation for why it, too, was leaving behind settled precedent." *Id.* (internal citation omitted). "[T]he NLRB—like any other agency—cannot 'turn[ ] its back

on its own precedent and policy without reasoned explanation.'" *Id.* at 1146 (citation omitted).

The D.C. Circuit thus held that "the NLRB should have recognized that longstanding NMB precedent—which the NLRB previously followed—compelled a finding of control in this case." *Id.* In light of the NMB's new standards that "require greater carrier control over personnel matters than the record evinced here," the NLRB was not free to ignore the NMB's earlier, inconsistent case law, "which it had effectively adopted as its own," but rather the NLRB was "obligated to consider that precedent and acknowledge the conflict in this case." *Id.* The court explained:

> At that point, the NLRB would have had two options. First, it could have attempted to offer its own reasoned explanation for effectively whittling down the traditional six-factor test. It would have needed to explain why such a change was appropriate, how the new test reasonably interprets the RLA, and why the NLRB has decided to determine for itself the appropriate test rather than keeping with its past practice of referring such questions to the NMB and deferring to their formulation of the test for RLA jurisdiction. Or the NLRB could have simply referred this matter to the NMB and asked that agency to explain its decision to change course. If the NLRB were persuaded, it could then have adopted the NMB's explanation as its own. The NLRB, however, followed neither path.

Id. at 1147. Because the NLRB instead followed the NMB's changed direction without explanation, the court concluded it must "vacate the NLRB's order as arbitrary and capricious." *Id.*

This Court should follow *ABM Onsite* here. Although this Court does not give "automatic deference" to the decisions of other courts of appeals and reaches its own conclusions as to issues of federal law, the Court does give "most respectful consideration to the decisions of the other courts of appeals and follow[s] them whenever [it] can." *Desiano v. Warner-Lambert & Co.*, 467 F.3d 85, 90 (2d Cir. 2006) (quoting *Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir.1987)), *aff'd sub nom. Warner-Lambert Co., LLC v. Kent*, 552 U.S. 440 (2008). The Court recognizes an "interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits." *Id.*

The Regional Director was aware of the D.C. Circuit's *ABM Onsite* decision when he filed his brief, but he failed to provide any argument why this Court should depart from the D.C. Circuit's reasoning. RD's Br. at 28 n.8. Nor did the Regional Director attempt to distinguish *ABM Onsite*. *Id.* For all of the reasons set forth in our opening brief and here,

the D.C. Circuit reached the correct result in *ABM Onsite*, and this Court should follow that decision to hold the NMB's unexplained new standards for asserting RLA jurisdiction over derivative carriers are arbitrary and capricious.

B. The Regional Director's assertion of jurisdiction over PrimeFlight is an arbitrary and capricious change from past practice that is not entitled to deference.

As in *ABM Onsite*, "[h]ad the NLRB followed the NMB's analysis in *Air Serv* [here], there is no question that [PrimeFlight] would be covered by the RLA and that the NLRB would have no jurisdiction over this labor dispute." *Id.* at 1144. As set forth in our opening brief, the NMB ***already found under the prior standards that PrimeFlight in materially indistinguishable circumstances was under sufficient carrier control to be subject to the RLA***. *See* Opening Br. at 39-43 (discussing *PrimeFlight Aviation Services, Inc.*, 34 NMB No. 33; 2007 NMB LEXIS 26 (June 21, 2007)). *See also PrimeFlight Aviation Servs., Inc.*, 353 NLRB 467 (2008) (deferring to NMB's opinion that PrimeFlight was subject to RLA).

The district court did not discuss the prior NBM decision involving PrimeFlight in similar circumstances but instead generally noted the

NMB's standards for finding sufficient carrier control to support RLA jurisdiction changed beginning in 2012-2013. *See* SPA 8. The district court deferred to the Regional Director's reliance on these new jurisdictional standards, deferred to the NMB's recent decisions declining jurisdiction under these new standards, and applied the NMB's new standards itself to confirm the NLRB's jurisdiction. *See* SPA6-SPA13. But the district court failed to recognize that the NMB' failure to explain the reasons for changing its three-decade-old standards renders those changes arbitrary and capricious. And in applying the NMB's new standards, the district court relied almost exclusively on *Bags, Inc.*, 40 NMB 165 (2013), one of the NMB opinions held up by the D.C. Circuit as an example of the NMB's asserting its new position without any reasoned explanation. 849 F.3d at 1144-45.

In his response brief, the Regional Director similarly ignores the prior NMB decision involving PrimeFlight and makes no attempt to distinguish it. Instead, the Regional Director, like the district court below, observes the NMB changed its standards as though that alone justifies a different outcome here on similar facts. *See* RD Br. at 28. The Regional Director also fails to acknowledge or respond to our argument

that under *Encino Motorcars* the NMB's new standards for finding sufficient carrier control—including the NMB's placing new "emphasis" on a carrier's control over a contractor's "personnel decisions" to the practical exclusion of all other factors—are arbitrary and capricious because the agency provided no explanation or rationale for them. *Compare* RD Br. at 28-29 *with* Opening Br. at 32-37.

Rather than attempting to justify the NMB's and NLRB's new standards, the Regional Director repeats the NMB's reasoning in *Bags* and invokes the principle of agency deference. RD Br. at 29-34. The Regional Director simply ignores all of the authority holding that no agency deference is appropriate where, as here, an agency's decision is arbitrary and capricious. *See* Opening Br. at 32; *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) ("An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference.").

C. The appropriate remedy is to vacate the district court's preliminary injunction.

In *ABM Onsite*, the D.C. Circuit found the NLRB had two options in confronting the NMB's arbitrary changes in its standards for asserting RLA jurisdiction over derivative carriers. Either the NLRB

could have attempted "to offer its own reasoned explanation for effectively whittling down the [NMB's] traditional six-factor test," or "the NLRB could have simply referred this matter to the NMB and asked that agency to explain its decision to change course." 849 F.3d at 1147. Because the NLRB followed neither path, the D.C. Circuit vacated its decision and remanded the case to the NLRB for further consideration.

Here, the Court is not reviewing a decision by the NLRB, but the Regional Director's prediction of what the NLRB's decision will be and whether it is likely to be enforced by a Court of Appeals. As the Regional Director states in his brief, the district court, in considering a petition for a 10(j) injunction, asks "whether there is 'reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals.'" RD Br. 19-20 (quoting *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980)).

ABM Onsite reveals the answer to that question here is ***no***. Under the present state of NLRB and NMB law, there is no reasonable cause to believe an NLRB decision finding PrimeFlight engaged in an unfair labor practice will be enforced by a Court of Appeals because the

NLRB's assertion of jurisdiction over PrimeFlight is an unreasoned, arbitrary, and capricious change from past practice. The Regional Director in his briefing has not offered any cause to believe the Board is able, or will attempt, to supply the reasoned explanation for the NMB's changed position that has hitherto been missing from the NMB's cases since 2012. And the ALJ's March 9, 2017 decision on the underlying unfair labor practice charge suffers from the same defects as the Regional Director's brief; it simply notes the "'shift' in the assertion of NMB jurisdiction in recent years" without purporting to supply a rationale for that "shift." Add. 6.[1] Finally, under the *Chenery* doctrine,

[1] The Regional Director already declined to refer the jurisdictional question here to the NMB for its opinion. *See* RD Br. at 24. To justify his position he need not refer this question to the NMB, the Regional Director wrongly relies on *UPS, Inc. v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996). There, the D.C. Circuit recognized "the NLRB has generally referred RLA jurisdictional questions to the NMB," but that practice is subject to the exception that "the NLRB typically does not refer a party to the NMB once the NMB has already determined that that party is not an RLA carrier, or once the party has already acknowledged the NLRB's jurisdiction, unless the party demonstrates some intervening material change in its circumstances." *Id.* at 1225. Applying that rule, the D.C. Circuit held the NLRB permissibly declined to refer to the NMB the question whether United Parcel Service, Inc. ("UPS") was subject to the RLA because UPS had "undisputably [been] governed by the NLRA for 47 years," had failed to show a significant change in its operations, and had "in fact repeatedly and recently acknowledged that the NLRB still maintains jurisdiction over its labor disputes." *Id.* at 1223, 1226. Applying the reasoning of *UPS* here would require the Regional Director to refer to the NMB the question whether PrimeFlight is subject to the RLA. Unlike UPS, PrimeFlight has *not* previously been subject to the NLRA and, to the contrary, has been found covered by the RLA in similar circumstances. Certainly the exception identified in *UPS* to

this Court could not attempt to supply reasoning for the NMB's (or NLRB's) changed position that those agencies failed to articulate themselves. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

When a district court "is convinced that the General Counsel's legal position is wrong . . . it should not issue an injunction." *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union, I.L.G.W.U.*, 494 F.2d 1230, 1245 (2d Cir. 1974) (interpreting the "reasonable cause to believe" standard in the context of NLRA Section 10(l)). This Court has also "made it clear that the district court's determination that there is reasonable cause to believe an unfair labor practice has been committed is a question of law subject to full appellate review." *Id.* at 1244. Because there is no reasonable cause to believe PrimeFlight committed an unfair labor practice as a matter of law, this Court should reverse the district court's determination and vacate its preliminary injunction.

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the NLRB's general practice of referring jurisdictional questions to the NMB does not apply here.

II. The Regional Director failed to show reasonable cause to believe PrimeFlight is a successor employer to AirServ.

As set forth in PrimeFlight's opening brief, even if there were reasonable cause to believe PrimeFlight were subject to the NLRA (which there is not), there would be no reasonable cause to believe PrimeFlight is a successor employer to AirServ under *NLRB v. Burns Security Services*, 406 U.S. 272 (1972) and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Opening Br. at 48-53. Rather, the district court wrongly found that PrimeFlight's workforce on May 23, 2016—the date the Union demanded recognition—represented a "substantial and representative complement" of PrimeFlight's workforce as a whole even though during the vast majority of PrimeFlight's operations, its workforce has included (1) only a minority of former AirServ employees and (2) a majority of employees in a job classification, wheelchair services, that did not even exist at AirServ. SPA3. The district court thus erred by focusing exclusively and artificially on the very short window of time between May 9, 2016, and June 16, 2016, when PrimeFlight's workforce included a bare majority of former AirServ employees and before the number of PrimeFlight

employees performing wheelchair services grew in June and July 2016 to its present number, where it has roughly remained ever since.[2]

In response, the Regional Director relies on *Fall River*, but contrary to his argument, the facts in *Fall River* are materially different from this case. RD Br. at 39-40. In *Fall River*, the Supreme Court considered whether the NLRB's "substantial and representative complement" rule was a reasonable means "for fixing the moment when the determination as to the composition of the successor's work force is to be made" for purposes of determining if a majority of its workforce had been employed by a predecessor and represented by a union. 482 U.S. at 46-52. The Court also evaluated the employer's proposed alternative "full complement" rule. *Id.*

The facts in *Fall River* showed that the prior employer, Sterlingwale, had operated a textile dyeing and finishing plant for over 30 years, and during almost that entire time, its employees had been represented by the same union. *Id.* 30-32. In February 1982,

[2] There is no allegation or evidence that PrimeFlight only temporarily inflated the number of wheelchair services employees in its workforce in response to the Union's demand for recognition, despite apparent insinuations in the Regional Director's brief to the contrary. *See* RD Br. at 9 (noting that "[t]hree days after the Union requested bargaining, PrimeFlight embarked on a new round of hiring employees, most of whom were not former Air Serv workers").

Sterlingwale laid off most of its employees due to economic declines, at which time those employees were working under a collective bargaining agreement. *Id.* 31-32. In late summer 1982, Sterlingwale went out of business. *Id.* at 32.

Around that same time, one of Sterlingwale's former officers formed a new company, Fall River Dying & Finishing, Corp. ("Fall River"). *Id.* Fall River purchased some of Sterlingwale's assets, and by September 1982 was operating out of some of its former facilities and had begun hiring some of its former employees. *Id.* at 32-33. The new company's "initial hiring goal was to attain one full shift of workers, which meant from 55 to 60 employees." *Id.* at 33. Fall River "planned to 'see how business would be' after this initial goal had been met and, if business permitted, to expand to two shifts." *Id.*

In October of 1982, the union that had previously represented Sterlingwale's employees demanded that Fall River recognize and bargain with it. "At that time, 18 of [Fall River's] 21 employees were former employees of Sterlingwale." *Id.* The facts further showed:

> By November of that year, petitioner had employees in a complete range of jobs, had its production process in operation, and was handling customer orders; by mid-January 1983, it had attained its initial goal of one shift of

> workers. Of the 55 workers in this initial shift, a number that represented over half the workers petitioner would eventually hire, 36 were former Sterlingwale employees. Petitioner continued to expand its work force, and by mid-April 1983, it had reached two full shifts. For the first time, ex-Sterlingwale employees were in the minority but just barely so (52 or 53 out of 107 employees).

Id. (internal record citations omitted).

During proceedings before the NLRB arising from Fall River's refusal to recognize the union, the ALJ concluded the proper date for determining that Fall River was a successor to Sterlingwale "was not mid-April, when petitioner first had two shifts working, but mid-January, when petitioner had attained a 'representative complement' of employees." *Id.* at 34. The NLRB affirmed the ALJ's decision, and the First Circuit enforced the NLRB's order. *Id.*

The Supreme Court affirmed. It reviewed its prior decision in *Burns*, where it "first dealt with the issue of a successor employer's obligation to bargain with a union that had represented the employees of its predecessor." *Id.* at 36. There, "about four months before the employer transition, the security-guard employees of Wackenhut Corp. had chosen a particular union as their bargaining representative and that union had negotiated a collective-bargaining agreement with

Wackenhut." *Id.* Wackenhut then lost its service contract on certain airport property to Burns, which "proceeded to hire 27 of the Wackenhut guards for its 42-guard operation at the airport." *Id.* The Supreme Court affirmed the NLRB's determination Burns was obligated to bargain with that union. Quoting from *Burns*, the Court explained:

> In an election held but a few months before, the union had been designated bargaining agent for the employees in the unit and a majority of these employees had been hired by Burns for work in the identical unit. ***It is undisputed that Burns knew all the relevant facts in this regard and was aware of the certification and of the existence of a collective-bargaining contract.*** In these circumstances, it was not unreasonable for the Board to conclude that the union certified to represent all employees in the unit still represented a majority of the employees and that ***Burns could not reasonably have entertained a good-faith doubt about that fact. Burns' obligation to bargain with the union over terms and conditions of employment stemmed from its hiring of Wackenhut's employees and from the recent election and Board certification.***

Id. at 36-37 (quoting *Burns*, 406 U.S. at 278-79) (emphasis added).

The *Fall River* Court observed *Burns* also "explained that the successor is under no obligation to hire the employees of its predecessor, subject, of course, to the restriction that it not discriminate against union employees in its hiring." *Id.* at 40. "Thus, to a substantial extent

the applicability of *Burns* rests in the hands of the successor." *Id.* at 40-41.

> If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated. This makes sense when one considers that the employer intends to take advantage of the trained work force of its predecessor

Id. at 41.

Extending its holding in *Burns* to the fact before it, the *Fall River* Court noted there was no dispute about when Burns' obligation arose because "Wackenhut's contract expired on June 30 and Burns began its services with a majority of former Wackenhut guards on July 1." *Id.* at 47. However, in the case before it, "there [was] a start-up period by the new employer while it gradually buil[t] its operations and hire[d] employees." *Id.* The *Fall River* Court agreed that in such situations, the NLRB's "full and substantial complement" rule was a reasonable means to fix the moment for determining whether the new employer was a successor to the former employer and obliged to bargain with its union. *Id.*

The Court rejected Fall River's alternative proposal that majority status should only be determined after the new employer has hired its

"full complement" of employees. *Id.* 49-51. The Court explained that "given the expansionist dreams of many new entrepreneurs," it might be more "difficult for a successor to identify the moment when the 'full complement' has been attained, which is when the business will reach the limits of the new employer's initial hopes" than it would be for this same employer "to acknowledge the time when its business has begun normal production-the moment identified by the 'substantial and representative complement' rule." *Id.* at 51.

Applying these insights, the Court concluded Fall River had hired a "substantial and representative complement" of its employees once it had begun "normal production" in January 1983 after hiring a complete first shift – which was approximately four months ***after*** it had begun operating and hiring former Sterlingwale employees in September and three months ***after*** the union had demanded recognition in October. *Id.* at 52. The Court rejected the employer's alternative proposed date of April 1983 when it had completed hiring for a second shift because "that expansion was contingent expressly upon the growth of the business." *Id.*

Overlooked by the Regional Director, the differences between the facts in *Fall River* and *Burns*, on one hand, and those presented here, on the other, are stark. First, the employers in those two cases were both aware the employees they hired from the prior companies had been represented by union and, in fact, had worked under collective bargaining agreements. Here, there is no evidence PrimeFlight had any knowledge that AirServ employees had recognized a union. Additionally, there is no evidence the AirServ employees hired by PrimeFlight ever worked under a collective bargaining agreement. There is certainly no evidence made a "conscious decision" undertake any bargaining obligation with the union. And *Fall River*'s assumption that a subsequent employer's decision to hire a prior employer's unionized workforce represents an intention "to take advantage of the trained work force of its predecessor" makes no sense here, where AirServ's employees never worked under a collective bargaining agreement and were not apparently "trained" by the union or as result of union activities.

The Regional Director also overlooks the fact that in *Fall River*, nearly four months elapsed between the time Fall River began hiring

the prior employer's employees and the time when the NLRB and Court concluded Fall River had begun its "normal production" and thus hired a "substantial and representative complement" of employees. *Id.* at 52. The Court rejected delaying that point after January 1982 because any further growth in Fall River's workforce after that date was "contingent expressly upon the growth of the business." *Id.* at 53.

Here, the Regional Director (and the district court) erred in concluding May 23, 2016, was the date when PrimeFlight had hired a "substantial and representative complement" because the facts show the continued expansion in PrimeFlight's workforce over the two months following that date was not "contingent" on the business's growth but rather was the result of PrimeFlight's continuing efforts to figure out how many employees it needed to handle its normal operations as they existed at that time. Just as Fall River had several months of "ramp up" time before it achieved "normal production," PrimeFlight experienced several months of ramp up time as it combined AirServ's and Pax Assist's businesses and continued to hire employees sufficient to handle that combined business.

The Regional Director's reliance on *Fall River* is therefore without merit.

III. The Regional Director failed to show injunctive relief is necessary to prevent irreparable harm.

As set forth in our opening brief, the district court also erred in finding that an injunction is necessary to prevent irreparable harm because the Regional Director failed to show what the "status quo" was at the time PrimeFlight commenced operations. Opening Br. at 56-59. In response, the Regional Director continues to fail to offer any evidence that PrimeFlight's decision not to recognize and bargain with the Union pending the NLRB's decision in this matter would have any negative impact on employees' support for the Union. Instead, the Regional Director simply asks this Court to presume such alleged harm, but he continues to ignore the fact that fourteen months elapsed between the time when the Union obtained recognition from AirServ and when PrimeFlight commenced operations, and during that lengthy period, the Union failed to obtain a contract with AirServ. There is no reason to believe that any alleged diminished support for the Union occurred after May 16, 2016, rather than before it.

The Regional Director also strangely argues that delaying PrimeFlight's recognition and bargaining with the Union may result in "[u]nion loss of support" among employees, and "[w]hen the company is finally ordered to bargain with the union . . . , the union may find that it represents only a small fraction of the employees." RD Br. at 46. This argument is strange because the union ***already, at best, represents only a small fraction of PrimeFlight's employees*** and has ever since June and July 2016 when PrimeFlight hired numerous employees who never worked for AirServ in the first place. As the district court found, "former Air Serv employees comprise[] 39.4%" of the employees hired by PrimeFlight as of July 2016. SPA4. Thus even assuming for the sake of argument that 100% of AirServ's employees ever "supported the union," they accounted for only a minority of PrimeFlight's employees for most of the time PrimeFlight has engaged in this business. An injunction cannot be justified as necessary to preserve the Union's majority support among PrimeFlight's current workforce because it has never had such support.

IV. The district court did not abuse its discretion by precluding the parties from bargaining about staffing levels.

In his cross-appeal, the Regional Director repeats the arguments he made in his Emergency Motion to Amend Judgment Pursuant to Federal Rule of Civil Procedure 59(e) ("Motion to Amend") [Docs. 29 & 29-1], asking the Court to delete Paragraph 2(b) from the Preliminary Injunction.[3] The district court issued a thorough Memorandum Decision and Order on December 13, 2016, denying that motion. SPA27-SPA36.

As a general matter, PrimeFlight incorporates the district court's comprehensive and through rejection of the Regional Director's contention the court abused its authority when it limited bargaining between PrimeFlight and the Union to exclude negotiations over "minimum number of shifts per employee or minimum staffing levels per shift" (the "staffing limitation"). As stated by the district court, the Regional Director "cannot point to any holding or statutory language that limits a court's ability to fashion a preliminary injunction" in this manner. SPA33.

Significantly, the Regional Director fails to acknowledge or respond to our argument that the district court's order including the

[3] The Regional Director also asked the Court to add a provision requiring PrimeFlight to cease and desist from failing to meet its statutory bargaining obligations. (*Id.)*

staffing limitation—which essentially finds that JetBlue controls PrimeFlight's staffing—is fundamentally inconsistent with the court's application of the NMB's new standards for determining carrier control. Opening Br. at 44-46. Indeed, the district court's including the staffing limitation further demonstrates the arbitrariness of the NMB's new standards for determining carrier control because they demonstrate those standards fail to give appropriate weight to all relevant forms of carrier control.

CONCLUSION

For the reasons above and set out in our opening brief, the district court abused its discretion by entering a Section 10(j) injunction based on novel theories from the NMB regarding the scope of its RLA jurisdiction. PrimeFlight respectfully requests the Court: 1) vacate the district court's preliminary injunction order, restoring the status quo pending resolution of the NLRB's administrative processes and acknowledging that the NLRB has not established that PrimeFlight is subject to the NLRA or is a successor employer, 2) dismiss the Petition, and 3) award it all other just relief to which it is entitled.

Respectfully submitted,

by: s/Christopher C. Murray

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CERTIFICATE OF SERVICE

I certify that on the 22nd day of May, 2017, I caused the RESPONSE AND REPLY BRIEF OF DEFENDANT-APPELLANT-CROSS-APPELLEE PRIMEFLIGHT AVIATIONS SERVICES, INC. to be filed electronically with the Clerk of the Court using the CM/ECF System, thereby serving all counsel.

s/Christopher C. Murray

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Local Rule 28.1.1(a) because this Brief contains 5,740 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Century Schoolbook 14-point font, a proportionately spaced typeface.

Dated this 22nd day of May, 2017.

s/Christopher C. Murray